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No. 53.

In the Supreme Court of the United States.

October Term, 1899.

C. M. PENDLETON, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE PHILIPPINE ISLANDS.

BRIEF FOR THE DEFENDANT IN ERROR.

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BRIEF FOR THE UNITED STATES.

ARGUMENT.

The points in this case regarded as of chief importance by the other side seem to be those stated upon page 29 of the transcript of record—

That there should be found error:

1. Because the accused was compelled to be a witness against himself, in violation of article 5, act of Congress of July 1, 1902.

2. Because his not taking the witness stand "has been used to his prejudice," in violation of his right to remain silent until his guilt should be established beyond a reasonable doubt.

3. Because the evidence did not show his guilt beyond a reasonable doubt.

The brief of appellant shows a considerable shifting of position as to No. 1. The chief trouble now is, it seems, that the prosecuting attorney examined the defendant for his own purposes before there was any "case" and just after the homicide occurred. How this can now be remedied is not made clear, and no authority for such a theory is claimed among the many cited.

NEW AND ABNORMAL SYSTEM OF PROCEDURE.

These propositions can not intelligently be discussed aside from a peculiar and wholly unprecedented system of law and procedure recently established for the lower courts and for appeals in Philippine cases.

Propositions 1 and 2, obviously, might involve one set of considerations from the view point of an ordinary trial here, where there is a jury, but quite another set where only the first instance court judge and the court of appeals weigh the evidence, and there is an appeal instead of a writ of error from the one to the other.

So, also, proposition 3 as a point on appeal involves considerations outside of the familiar domain of American criminal law.

Is this court, in another hemisphere, to weigh the evidence for the *third* time, and decide that it does or did or should leave, or should have left, room for doubt about the defendant's guilt ?

Is "reasonable doubt" in the law an independent thing to be properly spoken of aside from the state of mind of the trial court or jury, or does it suffice *that that tribunal* shall be *convinced* beyond a reasonable doubt?

The first thing to attempt is to get our general bearings in a somewhat novel and unusual situation.

NO JURY TO BE PROTECTED FROM BEING INFLUENCED.

The organic act of Congress, if it may be so called, has given the Philippines a bill of rights, but not the jury system, and the old civil-law plan of an instance court investigation, with the real trial in the upper court, was not retained, but the law gives an appeal to the Philippine Supreme Court. From this higher civil-law court appeal or error lies to this court in Washington, with power to affirm, reverse, modify, etc., the decisions of the Philippine Supreme Court.

Only the most fundamental questions concerning this system have been passed upon by this court, and those largely upon a division of opinions.

However, those decisions have made or left it clear that we still have the court of first instance and decision by a judge without jury; that that court's action is (in view of a military order) a *finality* unless appealed from, instead of a mere *preparatory* inquiry, as under Spanish law; that after a trial in the first court, a right of appeal exists in case of conviction, that is, only on behalf of the defendant; and that the appeal carries the whole case and the appellate Philippine court considers the whole record

and can substitute a judgment of its own for that of the lower court.

The military order referred to (No. 58) provides, among other things, under the head of "Rights of the accused at trial," that "in all criminal prosecutions the defendant shall be entitled—

> "3. To testify as a witness in his own behalf; but if a defendant offers himself as a witness he may be cross-examined as any other witness. His neglect or refusal to be a witness shall not in any manner prejudice or be used against him.
>
> "4. To be exempt from testifying against himself."

THESE TWO MILITARY PARAGRAPHS SUPERSEDED BY CONGRESSIONAL BILL OF RIGHTS.

Whether this part of the order is now in force may well be doubted, in view of section 5 of the act of Congress of 1902, which takes up the matter of "*the rights of the accused at trial*" and apparently undertakes to cover the same ground and the whole of it. Ordinarily such action works a repeal of the prior law on the subject and all parts of it covering that same ground, whether in conflict or not with the new law, and even though no provision is made for some details mentioned in the old law.

In favor of the view that this part of the order was actually intended to be superseded, it might be suggested that Congress would naturally think it preferable to use or adopt the constitutional Bill of Rights rather than the ideas of a military order, and

that accordingly "no person shall be compelled in any criminal case to be a witness against himself" of the Constitution was intended to be substituted for "the accused shall be entitled to be exempt from testifying against himself;" and as to paragraph 3 above quoted, Congress may well have recognized the first part (giving the accused a right to testify) as being unnecessary, in view of the local law and practice, which did not emanate from the provisions of the military order, and the latter part as inappropriate and inadequate, in view of the absence of the *jury* from the system of procedure. It must have been obvious to Congress that this last provision, if not inappropriate, was inadequate to accomplish the object its author seems to have had in view, having been borrowed from a system in which it is useful and practicable to exclude from the *jury* of ordinary *laymen*, who might not know that the accused has a right to testify, a certain argument against the accused from his failure to testify—a system in which, moreover, if the argument is *not* excluded, an independent authority can set aside the verdict and bring about a *new* trial before another *like jury*. But in this military system the trial is by the court, which does know the right of the accused, and, too, if the argument is made to the court and has any effect in prejudicing the mind of the court, there is no way of trying the case again in that court, except before the same prejudiced judge.

In other words, in our American system there is a bringing in of new minds by which the argument *has*

never been heard and by which the accused's right to testify is unknown or unappreciated. In the Philippines the same judge with the same mind would be there at the two trials, if a new trial should be ordered. In view of all this it is probable that Congress really meant to abandon paragraphs 3 and 4 of the order above quoted, and leave the "Rights of the accused at trial" to the Bill of Rights Congress borrowed from the Constitution.

We submit that appellant's brief demonstrates that section 3 of the military order was dependent on and perished with the superseded section 4: "to be exempt from testifying against himself." The brief shows how absolutely dependent upon the jury system and how inseparable from the right to abstain from self-incrimination the laws safe-guarding the so-called "right of silence" are. Congress saw the inappropriateness of the military scheme and eliminated it. Certainly, it would be grotesque to expect a judge learned in the law not to have his belief affected by something he can not help knowing. We doubt that Congress would conceive such a scheme, whatever a soldier might do. Belief is involuntary, and an effort not to consider a thing known would itself become a consideration of it. So far, however, as the mind could succeed in such an effort, it would be helped by deliberately writing down what was and was not in the case and to be or not considered in reaching conclusions, if that is what was done in this case.

IF THE MILITARY LAW IN FORCE AND VIOLATED, THEN THE TRIAL ON APPEAL WAS TO CORRECT THE MATTER.

Supposing, however, that this part of the military order remained in force during the trial here in question, we submit that in case of a violation of it in the court of first instance (where alone testimony is introduced, whether given by the accused or others) the order could not have been intended to have any further effect than to operate on the mind of the appellate court. That appellate court would have all of the evidence and try the case *de novo* (*Trono* v. *United States*, 199 U. S., 521), and in so doing could eliminate any evil produced by the wrongdoing of the lower court in compelling the testimony or in being prejudiced by a failure to testify. In our case we have the assurance of the higher court, and there is nothing, as we claim, to show the contrary, that its conclusions were reached without being in any manner prejudiced by the neglect or refusal of the defendant to be a witness and without "using" that against him.

Here was another and independent trial, a new trial, intended by the order to correct any erroneous proceedings of any kind in the other trial. See *Trono* v. *United States*, 199 U. S., 521. The accused was fairly tried *de novo*, and, if we accept the assurance of the upper court, as we think should be done, the accused has been convicted fairly and properly by the upper court, notwithstanding any prejudice the lower court

may have had because he did not testify. He is not entitled to *two* fair *convictions* because the lower court erred. The two *trials*, instead of one, he has already had, are no part of the Spanish plan or of any *other plan* outside of the military order referred to; and the order failed to provide in any way for the supposed wrong, except by allowing an upper court to correct it in reaching its own decision. He has had a "new trial."

Appellant's brief seems to rely upon an error not assigned, and on an inference not warranted—that there should have been a new trial in the lower court, because the upper court did not see the witnesses and confront the accused with them. The argument may be well enough as showing what the military plan might have been. The possibly illogical and inconsistent meanings of this order of a soldier can not be made other than they are or were by this line of argument, nor is a bill of rights, so called, when a mere law of Congress, any higher or more controlling than any other law of Congress or military order adopted by Congress. And this one, so far as not repealed or superseded, was adopted by Congress. But the accused had been confronted with the witnesses and their testimony written down and treated as depositions. The right to cross-examine has been given, and it is the accused, rather than the court, that must be confronted. The letter and spirit of that right to be confronted were fully complied with, and certainly as much so as in any other cases tried and appealed according to this novel system. See *In re Ross*, 140

U. S., 453, a very enlightening case concerning a trial without jury under a *quasi* bill of rights by a consular court.

THE LOWER COURT IS NOT SHOWN TO HAVE BEEN PREJUDICED AS SUPPOSED.

But although the upper court remarks (R., p. 26) "that the fact that defendant declined or failed to testify as a witness was taken into consideration by the court of first instance"—that is, was mentioned in its decision—we think we are entitled to contend here upon *the same record* that the lower court did not permit the neglect or refusal of the witness to "*prejudice*" the defendant or "*use*" it against him in any manner. We do not understand the higher court to affirm that the taking "into consideration" by the lower court injured the defendant with the lower court; but if that is what is meant by the higher court, what the lower court really did is here to speak for itself. Keeping in mind that there was no jury to be influenced by any arguments or comments of the court or attorneys, we do not see that the mere mention by the lower court of *an obvious fact*, namely, that the accused did not testify, proves that this fact affected the court's decision or constitutes "using" this fact against him in the sense in which that using is intended to be forbidden. The law and fact were known to the court, whether spoken of or not.

WHAT THE LOWER COURT MENTIONED WAS TRUE AND UNAVOIDABLY OBVIOUS WHETHER MENTIONED OR NOT.

We understand that the argument intended to be excluded from the *jury*, in our American courts, is that the man is guilty and for that reason has avoided taking the witness stand. Doubtless that same argument or inference is what the military commander sought to have avoided. Perhaps he had no very clear idea of such things, being a soldier, not a lawyer. But all that the lower court stated was known and obvious to that court—*unavoidably so*. If before appearing in public to announce its decision the court deduced any conclusion from the fact referred to, we can not know that, except from what it later said in public; and it does not appear from its statements that the court inferred any *guilt* from the fact of the defendant's not taking the witness stand. What the court said is this:

OVERWHELMING DIRECT PROOF ON ONE SIDE—MERE CRITICISM AND OPINIONS ON THE OTHER.

> The prosecution has presented *an abundance* of proof which, in case the court should give it *full credence*, would establish the guilt of the accused *beyond all reasonable doubt*. On the other hand, the defense has presented *very little proof;* the accused did not use his right to testify in his own favor, and no eyewitness has testified favorably for him. The defense has *practically limited itself* to insisting on (1) alleged contradictions between the various

witnesses of the prosecution relating to the details of identical facts or happenings related to them; (2) mistakes which they claim to be essential in the testimony of the witnesses for the prosecution with respect to distances and relative positions of persons and objects connected with the case; (3) the expert testimony of two physicians.

Obviously, the word "proof" is used, as it often is, for testimony.

Nothing could be plainer than the ideas intended to be expressed by the court, as it seems to us. The court is discussing relative *amount* of direct and other testimony presented by the two sides, and remarks that "the defendant has presented very little proof" and none by an "eyewitness," and that *its case stands* on the three things mentioned and numbered. We understand the court to say that the defense had presented *no direct proof*, and to refer to the defendant in that connection only by way of saying that neither he nor anyone had furnished any such direct proof or proof of an "eyewitness." There being *no direct proof put in, the court says so*, in order to come clearly to the evidence that *was* put in and was to be the basis and only basis of all its conclusions.

It is customary in civil law courts, in announcing to the public what has been previously decided, to make a formal statement in this way of what written testimony is in the record before proceeding to give the formally stated conclusions of fact therefrom. Unless this is kept in mind a mere

description of the state of the record may be mistaken for a part of the court's deductions. Of course, this court is familiar with civil law style and conceptions.

On the one side, abundant direct testimony; on the other, two experts and reliance upon contradictions and "inconsistencies" in the government testimony. Abundant direct *testimony* (if we "should give it full credence"), and the other side "limited" to criticism of that side—flaws—contradictions in its direct and abundant testimony, and some expert opinions. We submit that there is nothing in this mere statement of known and obvious facts, explanatory of what is and is not in evidence, which proves a violation either of the letter or the spirit of the prohibition in question. And we insist upon this the more because the court very explicitly tells us what did influence its mind about things, and on closely considering what it says, it is clear that the court was not influenced at all by the absence of the accused from the witness stand. The *direct* evidence was clear and full to the point that the accused was shamefully drunk, and the court recognizes this fact as an *extenuating circumstance*. For aught that appears in reading the judgment of the court, it may have thought (what the attorney for the accused voluntarily announced later to be a fact) that the accused was too drunk to remember what had occurred, so as to be able to be a witness. That he refrained because he was *conscious of guilt* can not possibly be inferred from the remarks of the court just quoted.

ALL THIS APPLIES TO THE SUPPOSED VIOLATION OF THE MILITARY ORDER BY THE HIGHER COURT.

Turning now to the higher court, also supposed to have violated the military order, if we disregard its assurance to the contrary and look at its opinion, we find only the following language:

> As to subsequent occurrences *we have not the benefit* of his recollection and must *rely on* the testimony of the witnesses for the prosecution and the circumstances of the case.

"Must rely" for all purposes of defense and prosecution, guilt or innocence, that is, on the witnesses and circumstances mentioned.

Is a judge, learned in the law, forbidden to allude to depositions in this way? Can he not mention what is self-evident? He is not stating his process of reasoning, which is mental and not on paper—thought, not words. He is not (being a civil law judge) trying to state merely his own deductions, but formally summarizing the written evidence and the record, preparatory to stating in set form his conclusions from what the record contains to "rely on."

We do not see in this any indication that the failure to testify was treated as raising any presumption of guilt. It is not a comment made to a jury which, either intentionally or otherwise, calls its attention to the right to testify and a refusal to testify, in such a way as might suggest the inference of guilt from these things. The court knew—there was no way to avoid knowing—that defendant could testify and had not testified. In a paragraph the

higher court merely states, in effect, this unavoidably known fact that he had not testified.

We confess we see no more than this in the lower court's remark—no more than this same mention of an unavoidably known fact, in enumerating the items of evidence put in or not put in the case—a statement made merely with a view to saying this is what the evidence on both sides consists of and to get down to the business of announcing a decision—a decision reached in the judge's mind, perhaps long before, by considering and weighing what *had* been put in.

NOT PART OF OUR FAMOUS AND REVERED CONSTITUTIONAL BILL OF RIGHTS.

The competency of an accused to testify, and accompanying rules, are no part of our bill of rights, so called, and were not included in the President's order of April 7, 1900, or in the act of Congress of July 1, 1902, both of which set forth in detail *a* bill of rights for the Philippines, both borrowed manifestly from our Constitution.

The military commander's provisions were doubtless suggested by nothing more sacred than an act of Congress of March 16, 1878, entitled "An act to make persons charged with crimes and offenses competent witnesses in the United States and territorial courts." In that law it was enacted that "the person so charged shall, at his own request, but not otherwise, be a competent witness. And his failure to make such request shall not create any presumption against him."

COMPELLING THE ACCUSED TO TESTIFY AGAINST HIMSELF.

The next proposition (quite the opposite to the first) is that defendant *was compelled to testify against himself*, by being compelled, through his counsel, to say that he was too drunk to remember what did occur at the time of the homicide.

There is no indication that his being too drunk to remember the facts operated against him. It seems to have operated for him, whether we regard his drunkenness as proven *wholly by* others (and it was by them proven beyond a doubt), or partly inferred from the remark of his counsel. That he was drunk enough to be in a fit condition to commit any crime or folly was proven beyond a doubt without any such remark. To *go* further and say he was *too* drunk to know or remember could only help him, and if he was forced to say this, he was merely forced to benefit himself.

NO REAL TESTIMONY, NO REAL COMPULSION, NOT REALLY AGAINST HIMSELF, IF COMPELLED.

It is not claimed that the accused really gave any testimony in the case; but the so-called testimony against himself relied upon is the statement (R., p. 25) of his counsel in the higher court that "he did not go on the witness stand because he did not remember anything about the occurrence;" which circumstance is said to have been discussed by the

upper court as a fact prejudicial to the defendant, in the following words (R. 19):

> The defendant, a lieutenant of constabulary, in command at the Parian Barracks at Cebu, being intoxicated, borrowed a carromata, which was without lights, from a friend and was found wandering about the streets there by a municipal policeman named Almonte, who, at his request, drove him to the barracks. As to subsequent occurrences we have not the benefit of his recollection and *must rely* on the testimony of the witnesses for the prosecution and the circumstances of the case.

WHAT MUST BE SHOWN TO MAKE OUT A CASE.

On this point, what the accused must from the record show is, first, that, in fact, his counsel made the alleged remark; that it was in reality testimony against him on the issue; that it was in some way testimony by him; that he was compelled to give it, within the meaning of the Philippine bill of rights; and that it has materially injured his case. But all this would go along with the emphatic statement of the court, which was also the jury, that it "*must rely* on the testimony of the witnesses for the prosecution." "Must rely" does not mean must rely for conviction, but must rely as a basis of decision. The court must rely on what it has and states what it has to rely on.

Having shown all this, the question will remain, what should be the consequence of the violation of his rights not corrected by the local courts; that is, should there be a correction here by a new decision

unprejudiced by this testimony of his, or what other course should be pursued?

We do not find anything in the record to show that any such remark of counsel *was made*. It does not appear that the *accused* told his counsel either to make the remark or *that he had* in fact been too drunk to remember. What the counsel is alleged to have said and who told him are certainly not proven by the quotation from the court's remark that accused was intoxicated or its remark, "as to subsequent occurrences we have not the benefit of his recollection and must rely on the testimony of the witnesses for the prosecution and the circumstances of the case."

Those statements could very well have been made, aside from any such supposed remark of counsel. That accused was drunk was testified to by the witnesses, and that the court "had not the benefit of his recollection" was an obvious fact which his merely not testifying sufficed to produce.

We submit that, for a newly appointed attorney to recite in a motion for a new trial that a former attorney made a remark in court, and did so for a certain reason, can not establish either of those two facts, for the purposes of this appeal. But we have here absolutely nothing else to establish either.

Conceding, however, for the sake of argument only, that the remark was made, there is nothing to connect the making it with the quotation from the brief of the fiscal about the failure of the accused to testify (R., p. 25), which quoted passage is supposed to be the

means employed for *compelling* the self-accusing testimony, so called.

It seems to be merely an argumentative inference of the new attorney that the one thing "compelled" the other. It is certainly not a necessary or obvious inference. To get leniently treated in reaching conclusions and mercifully treated as to punishment would be motive enough for claiming such intoxication. Certainly these are far more natural inferences.

Brief or no brief, the fact of not testifying was plain, and some explanation of it might, at any stage of the proceedings, have been deemed useful by defendant's counsel. Especially, having failed to explain at all in the lower court and there lost the case, they may have deemed it wise to experiment with the other course in the other court. This seems to be an afterthought by a zealous lawyer, who hoped to accomplish better results than his predecessor.

NO PROOF OF FACTS CONSTITUTING SUPPOSED COMPULSION; BUT IF PROVEN, WHAT THEN?

In view of the failure to show more facts about this alleged violation of the right of accused not to be compelled to testify against himself, it would seem superfluous to do more than suggest the questions of law that would arise if all the facts were properly established.

Such a sort of compulsion is not within the meaning of the Philippine bill of rights—to have an attorney's argument in his brief bring the accused

or his counsel to believe that it was wise to announce that he had been too drunk to remember what happened.

This so-called testimony could easily have been avoided. It was *purely voluntary*, since the attorney could have called the court's attention to the supposed improper remark in the fiscal's brief, and warned the court against *itself* violating the law. It would have been as easy and as natural to call that high court's attention, by way of warning, as it was to take chances and later try to make a point of this pretended compulsion.

Parties have no right to omit to demand fair and proper treatment at any stage, and then come here to complain—no right to gamble on what one court will do and then seek from another what they might have obtained for the asking in the lower court.

But conceding that this was *testimony* of the *accused* and that it was *compelled*, yet how is it shown that it was *against* himself?

HOW IS THIS SO-CALLED TESTIMONY AGAINST THE ACCUSED ON THE ISSUE OF ASSASSINATION OR NOT?

The admission or allegation (if made) was made by counsel in the appellate court, after all that is properly testimony was in, after his being "in a shameful state of drunkenness" was established beyond a doubt and the testimony closed; and after this testimony had been passed upon with a result unfavorable to the accused.

If it was against the accused, so far as his reputation for limited intoxication was concerned, can it be doubted that to show that, besides being drunk, as fully proven otherwise, he was *too drunk to remember* what he had done, tended to show that he did not know *at the time* what he was doing, and was morally and equitably irresponsible?

If he was already shown to have been beastly drunk, would not wiping out memory naturally incline the court to the most favorable view? Beastly intoxication, without loss of memory and knowledge, would play as good a part in *causing the supposed crime*, and it seems to us that to go a step further in intoxication could only tend to excuse the defendant and to placate the court—to prejudice it in the accused's favor *on the issue*.

NOT PROVEN BEYOND A REASONABLE DOUBT!

We come now to the proposition that the evidence does not show the guilt of the accused beyond a reasonable doubt. This has no resemblance to the proposition (which could not possibly be suggested in the present case) that there is not sufficient evidence for the case to go to the jury. It seems to be a new or unprecedented proposition, and when made in this court, instead of below, strikes us as preposterous. But assuming that this court is, for some purpose or with some consequence, to consider reasonable doubt, was or is there any such thing here?

It might suffice to say that a perusal of the evidence leaves absolutely no doubt.

The witnesses who were present all testify to the same facts. No motive for falsifying is suggested, nor any ground of suspicion against any other person than the accused. The "experts" and the alleged contradictions amount to nothing. The variations in the stories strengthen one's belief—if of so direct a tale there could be any stronger belief than the plain, unimpeached testimony of eye witnesses having no even alleged motive to falsify produces. The doubt must be unreasonable, artificial, theoretical. No sane mind, we think, can read and not believe as to the main facts.

The story, with the drink included, is in no way improbable in itself.

But, in the absence of any positive law for these particular appeals, we submit that this court's general rule and system concerning facts found by the lower courts ought to be applied, and would prevent the incongruity and absurdity of attempting to treat "reasonable doubt" as something wholly apart from the minds of the *persons to be convinced*.

Surely it is not intended that as to a matter of fact (of which we consider laymen better able to judge than lawyers) a gambling on lower and higher courts is intended beyond the two trials in the Philippines the military authorities prescribed. Congress surely could not consider such a plan as supposed natural.

Efforts to define what kind of a doubt is reasonable have not met with any too great success; but here we have proposed a more abstruse problem, viz, ought

the trial judge or two trial judges to have been convinced beyond a reasonable doubt, as they say they were?

Is that to be solved by experimenting with the minds of the honorable justices of this court?

Or is the problem—is this highest court, sitting in Washington, convinced beyond a reasonable doubt about an act of violence in a Philippine town? The justices of this court with their learning and ability as lawyers are not, according to our Anglo-American notions, as fit as a jury of the vicinage to say whether that deed happened or not.

They did not see the accused or live near the scene, and, unlike the Philippine supreme court, they live halfway around the globe from the alleged occurrences and witnesses—that is, in almost another world, socially and in every way.

But we doubt that this third point will be much insisted upon, in view of the clear and substantially uncontradictory testimony, were there no other reason.

FACTS ARE FOR COURT BELOW.

Finally, we do not understand that in this case, brought here on writ of error, any but a law question can be examined into. Whether the evidence, when there is quite a mass of evidence bearing directly upon the point, proves a fact or not can not be regarded as a law question. That is what juries ordinarily have submitted to their lay minds. It is not a law question. The act conferring jurisdiction of these appeals

expressly provides for a writ of error when appropriate, and it certainly seems to be so in this case. (See *Santos* v. *Roman Catholic Church*, 212 U. S., 464.)

For the reasons stated, the judgment below should be affirmed.

CHARLES W. RUSSELL,
Assistant Attorney-General.

NOVEMBER, 1909.

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